in the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1756

WALTER B. LEBOWITZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

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WALTER B. LEBOWITZ,

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

The petitioner, WALTER B. LEBOWITZ, prays that a Writ of Certiorari issue to review the Judgment of the District Court of Appeal of Florida, Third District, which Judgment became final when the Supreme Court of Florida denied further appellate review.

OPINIONS OF THE COURTS BELOW

The May 27, 1975 Opinion of the District Court of Appeal of Florida, Third District, is reported at 313 So.2d 473, and reprinted as Appendix A hereto. A timely Petition for Rehearing was denied on June 18, 1975. (App. B) The Supreme Court of Florida denied the petitioner's Petition for Writ of Certiorari on January 21, 1976 (Justice Boyd dissenting). (App. C) On March 9, 1976, Petition for Rehearing was denied in the Supreme Court of Florida (Justice Boyd dissenting). (App. D)

JURISDICTION

The Judgment of the Supreme Court of Florida denying the petitioner's Petition for Rehearing was entered on March 9, 1976. (App. D) The jurisdiction of this Court is invoked under the provisions of Title 28 United States Code §1257(3) and Amendments V and XIV of the United States Constitution.

QUESTION INVOLVED

IS IT CONSTITUTIONALLY PERMISSIBLE TO CROSS-EXAMINE A DEFENDANT AND COMMENT IN ARGUMENT ABOUT HIS PRIOR SILENCE?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, Constitution of the United States:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a present-

> ment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

§811.16 FSA

> "Buying, receiving, concealing stolen property.
>
> "Whoever buys, receives, or aids in the concealment of stolen money, goods, or property, knowing the same to have been stolen, shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

STATEMENT OF THE CASE

The petitioner, WALTER B. LEBOWITZ, was convicted for a violation of §811.16 FSA; more particularly the crime of buying, receiving or concealing stolen property, to-wit: a purse valued at $200.00. (R. 1194) The petitioner was sentenced to eighteen (18) months incarceration.

Simply stated, the trial was a tug of war with the credibility of the petitioner, an attorney, on one side, and the credibility of his former client, George Foley, on the other.

FOLEY'S TESTIMONY

The State's case rested on the testimony of Foley, who had been convicted of eighteen crimes (R. 281), a self-admitted thief (R. 411), a self-admitted liar (R. 411), had been a patient in a mental hospital (R. 382), and was given immunity for his testimony. (R. 420)

Foley stated that on November 18, 1973, the petitioner called him and requested that he secure a particular purse for the petitioner's wife by issuing a false check, (R. 383-385) for which the petitioner would pay to him twenty-five (25%) percent of the retail value. (R. 386)

Foley said he went to the department store on November 23, 1973, and purchased the purse with a check issued on a closed account. (R. 288) He received a sales slip which was marked paid in cash. (R. 390-392, 1226) On November 26, 1973, Foley returned the purse and received a $208.00 cash refund. (R. 392-393) Foley stated he re-

turned to the department store on November 30, 1973, and with the aid of a friend stole the purse, which he gave to the petitioner, and received $50.00. (R. 398-400, 402-403)

On December 7, 1973, Foley relayed the foregoing information to Miami Beach Police, who secured a search warrant for the petitioners' home.

THE SEARCH

At approximately 8:00 A.M. on December 8, 1973, five police officers of the Miami Beach Police Department went to the petitioner's residence, awakened him, read the search warrant and conducted the search. (R. 2277-2290, 2317)

Within moments, an officer found the purse and the petitioner was immediately placed under arrest and was read, *inter alia*, his right to remain silent. (R. 290-291)

Before, during and after the search, the petitioner was asked no questions nor did he volunteer any information. (R. 873)

PETITIONER'S TESTIMONY

The petitioner denied that he asked Foley to steal or otherwise obtain the purse by worthless check. (R. 755) He stated that he had represented Foley in some 25 to 30 civil and criminal cases. (R. 734-735) On or about November 20, 1973, Foley came to his residence to discuss a recent arrest, at which time the petitioner told him that he could not continue the conference because he had prom-

ised his wife that he would purchase a purse that she had seen. He said that Foley, as a good will gesture, offered to buy the purse for him. (R. 744) Approximately a week to ten days later Foley gave him the purse. (R. 747-749)

After his exculpatory testimony, the prosecutor in cross-examination asked and the petitioner answered the following series of questions:

"Q. [By Mr. Carhart] Okay. Now, the police say that when they got finished reading the warrant, you invited them to go search. Is that true?
A. No, sir.

Q. You didn't tell them to go search?
A. I didn't tell them anything, sir. They said go into the bedroom with your family. We want all three of you that woke up, or that are up, to sit on the bed so that we know where you are, something to that effect.

Q. Did you tell them, hey, I know what you're talking about, and I got a purse just like that upstairs in my bedroom?
A. We were upstairs when they read the warrant.

Q. Did you say, hey, I know what you're talking about, and I got a purse like that right there in the closet?
A. I didn't get a chance to. I walked into the bedroom and like a minute later the officer walked in with the purse.

Q. Did they gag you?
A. I was sleeping when the maid called me, sir. I just had been awakened.

Q. But now you're awakened. Now you're listening to the search warrant, and when they finished reading the warrant, did you say, just a second, gentlemen, I know what this is all about and I have got such a purse in my bedroom. I was given it as a gift by George Foley, who showed me a receipt for it. Is that what you said to them?
A. I didn't say anything to them. I followed their instructions, sir.

Q. Well, after they came out with the purse, did you say to them, wait a minute, officers, before you arrest me, or do anything else in this case, let me tell you something. I got that purse. All right. But, I got it from a fellow named George Foley. And he's got a receipt for it. He paid cash for it. Did you tell them that?
A. When they came into the room, one of the officers read a card to me telling me that I had the right to make a telephone call, which I chose to do.

Q. Came in with the purse and the card?
A. Excuse me, sir.

Q. Came in with the purse and the card?
A. I don't think it was the same officer that came in with the purse.

Q. When the officer with the purse walked into the room —
A. Yes, sir.

Q. — is that when you told them, hey, I got this purse from George Foley as a gift?
A. I didn't make any statement to the officers. They did not ask me and I did not respond." (R. 871-873)

In closing argument the prosecutor said:

"Here's a man, the police come to his home. Knock knock. They let them in. The maid advises him the police are here. They have a search warrant. . . Now, that might take you by surprise or it might take most people by surprise, but this man is a lawyer. You're dealing in his field. So, he goes down there and the police read him the warrant and they describe the stolen property and they go into the description of the purse. Now, from your common sense, from your everyday experience, what does the person whose heart is pure, who's an innocent person, a possible victim of circumstances, say at that point? Oh, my God, I got a purse like that up in my bedroom. A client gave it to me the other day as a gift. Does he say, wait a minute, fellows, I know I must have a receipt here someplace. He showed it to me. You don't have to search my house, gentlemen. I've got that purse. Let me get it for you. And, I want to give you a statement right now where I got it from, who gave it to me. I will stand as a witness if there's criminal charges to

be brought out of this thing, and see that that man is prosecuted. Or, do you say, go ahead and search. Not from the testimony of George Foley. The Miami Beach Police said that. What do you do?

What did he say when they read the warrant to him? He invited us to go ahead and search. Now, that was very generous of Mr. Lebowitz, five policemen there with a search warrant. That was very generous of him to say go ahead and search. Are you satisfied that that's an honest man standing there? Or, is that consistent with the man who knows that he's been had, that he's been caught, that he's trapped with the evidence in his home?" (R. 1110)

REASONS FOR GRANTING THE WRIT

There is a continuing conflict among the several state and federal courts as to whether a prosecutor may, consistent with the constitution, cross-examine a defendant regarding his silence when faced with incriminating circumstances. This Court has granted writs of certiorari involving this constitutional issue. *Doyle vs. Ohio*, #75-5014, and *Wood vs. Ohio*, #75-5015, argued February 23, 1976.[1]

[1]The only distinction between *Doyle-Wood* and the case *sub judice* is Doyle-Wood were in custody and given Miranda warnings, whereas the petitioner was not free to leave (R. 871) and being an attorney was fully aware of his right to remain silent.

ARGUMENT

I.

IS IT CONSTITUTIONALLY PERMISSIBLE TO CROSS-EXAMINE A DEFENDANT AND COMMENT IN ARGUMENT ABOUT HIS PRIOR SILENCE?

It is well established that the self-incrimination clause of Amendment V of the United States Constitution is applicable to the several states through the provisions of Amendment XIV. *Malloy vs. Hogan*, 378 U.S. 1 (1964); *Miranda vs. Arizona*, 384 U.S. 436 (1966). In *Malloy*, this Court said that the Fifth Amendment protects:

> "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." At p. 8.

Although these cases dealt with substantive and procedural aspects of custodial confessions, they are nonetheless founded on the constitutional principle that a person has an absolute right to remain silent. This right is not predicated upon the custodial status. *Cf. Grunewald vs United States*, 353 U.S. 391 (1957).

Like *Grunewald*, this Court in *United States vs. Hale*, 45 L.Ed.2d 99 (1975), held that it was improper to cross-examine a defendant about his earlier silence, but declined to rest its decision on a constitutional basis.

As a practical matter, in order for silence to have any probative force, it would be necessary to understand the subjective psychological thought process of each and every person who remains silent in the face of incriminating circumstances. In all probability, when asked many months later why he did so, he could not honestly or accurately explain his action.

For example, in the case sub judice, did the petitioner actually fear self-incrimination? Did he remain silent because he, as an attorney, might have felt that it would have been a breach of the Canons of Ethics (although incorrectly) to reveal that a client had given him the purse? Was he simply confused, having been awakened out of his sleep by five police officers with a search warrant for his home? Or did the petitioner simply do that which he undoubtedly advised many clients to do under similar circumstances? With such a myriad of innocent reasons, it cannot be said that silence is inconsistent with later exculpatory testimony and demonstrates the wisdom of this Court's statement in *Hale:*

> "In the light of the many alternative explanations for his pretrial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission." At p. 107.

The issue here, however, is neither the practicality nor the probative value, but whether or not this type of cross-examination comports with the constitution.

An established and basic premise is that the exercise of the privilege carries with it no implication of guilt. See

Grunewald, supra. As stated in *Slochower vs. Board of Higher Education*, 350 U.S. 551, 557, 558 (1956):

> "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

If that be the case, then the privilege may not constitutionally be used to create an inference of guilt, whether by evidence in the case in-chief, by cross-examination of the defendant, or in closing argument.

This Court has consistently held that no penalty may attach as a consequence of exercising the Fifth Amendment right. *Malloy vs. Hogan, supra; Garrity vs New Jersey*, 385 U.S. 493 (1967); *Spevack vs. Klein*, 385 U.S. 511 (1967). In *Spevack*, the Court expressed its understanding of the word "penalty" when it said:

> "In this context, 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin vs. California*, 380 U.S. 609, the imposision of any sanction which makes assertion of the Fifth Amendment privilege 'costly'." At p. 515.

Based upon that, we must then turn to what penalty one suffers for exercising the constitutional right to remain silent when that fact is brought to the attention of the jury. As this Court stated in *Hale:*

> "Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice." At p. 107.

The same prejudice attaches whether it results from the lack of probative value or from a constitutional deprivation.

Although we, as lawyers, fully appreciate that the invocation of the Fifth Amendment carries with it no implication of guilt, and was designed to protect the innocent, we respectfully suggest that not too many jurors have read *Slochower*, *Grunewald* or *Hale*, and highlights the Court's statement in *Hale:*

> "The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted." At p. 107.

If a defendant is not constitutionally protected for the exercise of the privilege during an investigative phase of a developing criminal case, the only avenue open to him in order to avoid the penalty of jury disclosure is to forgo testifying in his own defense. We submit that price is too high and "costly".

It would be an anomaly in the law if one were given the right to remain silent, for which there can be no penalty, and thereafter permit the use of that right as a basis for a conviction.

CONCLUSION

The right to remain silent is premised upon a constitutional provision and it is unwarranted to base a decision on any other legal principle.

Therefore, the Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1975

CASE NO. 74-863

WALTER B. LEBOWITZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed May 27, 1975.

An Appeal from the Circuit Court for Dade County, Sidney M. Weaver, Judge.

Philip Carlton, Jr. and Arthur Joel Berger, for appellant.

Robert L. Shevin, Attorney General, and Linda C. Hertz, Assistant Attorney General, for appellee.
Before PEARSON, HENDRY, and HAVERFIELD, JJ.

PER CURIAM.

The appellant was convicted by a jury of the crime of buying, receiving or concealing stolen property, to wit: a purse, in violation of Fla.Stat. § 811.16, F.S.A. He appeals therefrom, and we affirm.

Six points have been raised on appeal; however, in his reply brief, appellant abandons his first point.

Appellant is an attorney with experience in criminal law. His chief accuser, and the state's star witness during the trial, was one George Foley.

Foley testified that the appellant requested that he (Foley) go to the Neiman-Marcus Department Store, located in Bal Harbour, wherein he would find a Judith Lieber brand purse, about six inches long, egg shaped, with spangles on it and two silver chains. Appellant indicated that the purse was worth about $200, and his wife desired to have it for a society affair.

Foley was appellant's client and a convicted felon for crimes of theft and forgery. Foley testified that the appellant wanted him to secure the purse by means of a false check.

Foley did so, but a few days later he returned the purse and received $208 from the store as a cash refund. Then some four days later, on November 30, 1973, Foley went back to Neiman-Marcus, this time accompanied by his roommate, John Sankey. The two men succeeded in stealing the purse.

Foley testified that he and Sankey then drove directly to the appellant's Miami Beach home, and Foley went inside and delivered the purse to the appellant who paid him $50 for his effort.

The appellant took the stand in his own behalf, and his account was sharply different. Appellant testified that he was holding a conference with Foley in his office, when he mentioned that he was busy and that he had to go to Neiman-Marcus to purchase the purse which his wife had seen and wanted.

Appellant stated that Foley offered, as a good-will gesture, to buy it for the appellant because of all the legal work which appellant had performed on Foley's behalf and also because of appellant's patience in collecting his legal fees from Foley. (Appellant testified that at the time Foley owed him $3,000 in fees.)

Further, appellant testified that several days prior to actually delivering the purse to him in a Neiman-Marcus box, Foley had shown him a receipt for it, and therefore appellant had no reason to suspect that Foley had stolen it.

The record reveals that both Foley and the appellant were subjected to intense examination by an able and competent defense attorney and prosecutor. Three of the five points on appeal concern the cross-examination in this case.

First, appellant argues that he was denied his right to remain silent and free from self-incrimination under the Fifth Amendment, and also his right to a fair trial, where the prosecutor inquired on cross-examination concerning the failure of the appellant to explain his possession of

recently stolen property to law enforcement officers who were executing a search warrant in the appellant's home, seeking to find the purse.

The warrant was issued based upon an affidavit by a Miami Beach police officer and an affidavit by Foley, who was arrested a couple of days after he stole the purse and told police he had given it to the appellant. It was executed on December 8, 1973, a Saturday, at 8 o'clock in the morning.

The record reveals the following testimony by the appellant on cross-examination:

"Q [By Mr. Carhart] Okay. Now, the police say that when they got finished reading the warrant, you invited them to go search. Is that true?
"A No, sir.

"Q You didn't tell them to go search?
"A I didn't tell them anything, sir. They said go into the bedroom with your family. We want all three of you that woke up, or that are up, to sit on the bed so that we know where you are, something to that effect.

"Q Did you tell them, hey, I know what you're talking about, and I got a purse just like that upstairs in my bedroom?
"A We were upstairs when they read the warrant.

"Q Did you say hey, I know what you're talking about, and I got a purse like that right there in the closet?
"A I didn't get a chance to. I walked into the bedroom and like a minute later the officer walked in with the purse.

"Q Did they gag you?
"A I was sleeping when the maid called me, sir. I just had been awakened.

"Q But now you're awakened. Now you're listening to the search warrant, and when they finished reading the warrant, did you say, just a second, gentlemen, I know what this is all about and I have got such a purse in my bedroom. I was given it as a gift by George Foley, who showed me a receipt for it. Is that what you said to them?
"A I didn't say anything to them. I followed their instructions, sir.

"Q Well, after they came out with the purse, did you say to them, wait a minute, officers, before you arrest me, or do anything else in this case, let me tell you something. I got that purse. All right. But, I got it from a fellow named George Foley. And, he's got a receipt for it. He paid cash for it. Did you tell them that?
"A When they came into the room, one of the officers read a card to me telling me that I had the right to make a telephone call, which I chose to do.

"Q Came in with the purse and the card?
"A Excuse me, sir.

"Q Came in with the purse and the card?
"A I don't think it was the same officer that came in with the purse.

"Q When the officer with the purse walked into the room —
"A Yes, sir.

"Q —is that when you told them, hey, I got this purse from George Foley as a gift?
"A I didn't make any statement to the officers. They did not ask me and I did not respond."

As can be seen, appellant's counsel did not interpose any objection during this exchange. Nevertheless, it is urged that the prosecutor's interrogation was plain error of constitutional magnitude, and therefore this court must reverse.

Since the United States Supreme Court handed down its decision in Harris v. New York, 401 U.S. 222, 91 S.Ct. 943, 28 L.Ed.2d 1 (1971), there has been a clear divergence of opinion among members of the federal judiciary as to the precise issue raised by the appellant under this point. See, United States v. Ramirez, 441 F.2d 950 (5th Cir. 1971); United States ex rel. Burt v. New Jersey, 475 F.2d 234 (3rd Cir. 1973); United States v. Anderson, 498 F.2d 1038 (D.C.Cir. 1974), see also Judge Wilkey's dissent; Deats v. Rodriguez, 477 F.2d 1023 (10th Cir. 1973), see also Judge Barrett's dissenting opinion; Johnson v. Patterson, 475 F.2d 1066 (10th Cir. 1973), see, Judge Breitenstein, dissenting.

In Harris v. New York, supra, the U.S. Supreme Court stated:

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [Citations omitted.] Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process."

In Harris, the court held that the standards enunciated by the court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), would not serve to shield a defendant from perjury by confronting him with a prior inconsistent statement.

The courts which have expressed the view that Harris does not apply where the defendant has stood mute (therefore making no "statement"), have reasoned simply that there has been no prior inconsistent statement, therefore no potential perjury; and the defendant may not be penalized for his prior silence when he subsequently takes the witness stand in his own behalf.

However, we align ourselves with those federal courts (including the U.S. 5th Circuit in United States v. Ramirez, supra) and those federal judges who have concluded that once the defendant takes the stand in his own defense, he waives his immunity under the Fifth Amendment and subjects himself, like any other witness, to the full truth-testing process. It is our view that such a waiver

should not be partial, and the prosecution should not be unfairly hamstrung in testing a defendant's credibility.

We agree with Judge Breitenstein's reasoning in his dissenting opinion in Johnson v. Patterson, supra, wherein he commented:

> "My position is that when a defendant testifies he may be impeached like any other witness. The use of pre-trial silence for impeachment depends on whether, in the circumstances presented, there is such inconsistency between silence and testimony as to reasonably permit the use of silence for credibility impeachment. In the case at bar the trial court did not exercise the discretion which it has in this area because there was no contemporaneous objection. I believe that the cross-examination was proper for imueachment purpose because common sense teaches that on arrest for forcible rape an accused will claim consent if such be the fact."

In the cause sub judice, there likewise was no contemporaneous objection. Also present in the instant case is a deeply-rooted common law inference that guilty knowledge may be drawn from the fact of unexplained possession of stolen goods. See, Barnes v. United States, 412 U.S. 837, 37 L.Ed.2d 380, 93 S.Ct. 2357 (1973(; State v. Young, Fla. 1968, 217 So.2d 567.

The appellant staunchly denied ever suggesting to Foley that he steal the purse, adding, "I wouldn't jeopardize my practice and my possessions for a silly $200 purse."

In such a light, we think the state's cross-examination was a logical and common sense test of the appellant's credibility and one which the appellant certainly invited by his own testimony on direct examination. Indeed, we think that to have denied the state the right to point out the appellant's previous silence, in light of his elaborate version at trial of his transaction with Foley concerning the purse, would have been unfair to the state.

Next, appellant raises two points which focuses our attention upon the cross-examination by defense counsel of the witness Foley. Appellant first asserts that the trial court denied him due process and his right of confrontation by refusing to permit the appellant to impeach Foley's credibility by use of conversations which the defendant had with psychiatrists.

Appellant vigorously attacked Foley's competence to testify as a witness due to his past mental problems. Outside of the jury's presence, appellant offered a psychiatrist with the Florida Division of Corrections who evaluated Foley at the state's Lake Butler Center. The psychiatrist diagnosed Foley as chronically schizophrenic.

However, the state also presented another psychiatrist and proferred two others who felt Foley was competent to testify. The record shows that the trial judge ruled that the jury could hear psychiatric opinions concerning Foley's competence but no specific conversation between the patient and psychiatrist during their consultations.

We find no abuse of discretion in the court's ruling. See, 35 Fla.Jur., Witnesses §53. We note that Foley specifically objected to revelation of any of his communica-

tions with the psychiatrists, and under Fla.Stat. §90.242, F.S.A. his conversations with the psychiatrists were privileged. *Cf.*, Schetter v. Schetter, 1970, 239 So.2d 51.

Moreover, any error in the court's ruling was harmless under Fla.Stat. §924.33, F.S.A. because from the record we cannot find that the appellant called any of the psychiatrists to testify before the jury concerning Foley's alleged incompetence. Also, the record shows that defense counsel managed quite skillfully to elicit from Foley for the benefit of the jury some of the rather bizarre statements Foley supposesdly had made to psychiatrists (including his statements regarding his connections with the F.B.I. and the Mafia and his statement that while in Vietnam, for some reason, the F.B.I. attempted to shoot down his helicopter).

We would point out also that Foley testified on cross-examination that he had a college degree in psychology and that he was proficient at lying or otherwise faking his replies to the psychiatrists and feigning his behavior traits so that he could be declared insane and avoid criminal responsibility for many of the charges against him.

The next point raised by the appellant questions the state's introduction of testimony regarding the commission of alleged collateral crimes by the appellant, most of which involved his relationship with the witness Foley.

Appellant contends that the prosecutor was overzealous; acted in violation of the so-called Williams rule [See, Williams v. State, Fla. 1959, 110 So.2d 654; Drayton v. State, Fla.App. 1974, 292 So.2d 395]; and therefore prejudiced his right to a fair and impartial trial.

The Williams rule, as this court stated in Drayton, is an evidentiary rule which requires that where the state introduces evidence of other crimes, they must be relevant to a matter at issue. See also, Lawson v. State, Fla.App. 1974, 304 So.2d 522. One such issue specifically stated in Drayton was the defendant's alleged guilty knowledge.

In the instant case, as we have previously said, the appellant vehemently denied knowledge that the purse was stolen by Foley. However, on cross-examination of Foley by the defense it was brought out that Foley was attempting to "set up" the appellant, cooperating with the police by attempting to deliver a stolen television set to the appellant.

In addition, defense counsel also drew a reply from Foley on cross-examination that any legal work which the appellant ever performed for Foley was paid for with stolen "merchandise, money and different things that he (the appellant) wanted."

On redirect, Foley stated that on several other occassions he had delivered stolen television sets to the appellant and stolen airline tickets.

In sum, we think that the appellant himself opened the inquiry into alleged collateral criminal activity between himself and Foley and possibly other clients. It is our conclusion that these collateral matters were relevant to the issue of guilty knowledge, and reversible error has not been shown.

Appellant's last two points challenge an alleged conversation between a juror and a state's witness during a lunch break, and the sufficiency of the search warrant procured by the police.

With respect to the first two points, appellant concedes that his motion for a new trial (which first brought to the trial court's attention the alleged contact between a juror and a witness) was filed untimely. Therefore, this matter has not been preserved for our consideration on appeal at this time. See, Thompson v. State, Fla.App. 1974, 300 So.2d 301; Thomas v. State, Fla.App. 1971, 250 So.2d 308.

We would observe that in order to set aside a jury verdict due to misconduct, the alleged misconduct must be shown to have influenced the verdict and to have caused injury to the complaining party. Russom v. State, Fla. App. 1958, 105 So.2d 380. The record before us is devoid of any evidence indicating adverse influence upon any member of the jury stemming from the contact between the juror and witness.

The witness, an employee of Neiman-Marcus, was called by the state basically to establish that the purse had been stolen from the store. Without more appearing in the record, it would be impossible for this court to conclude that any juror could have been prejudiced or improperly swayed by the lunchroom conversation.

Lastly, appellant's contention that the affidavits by a police officer and Foley were constitutionally defective and insufficient under Fla.Stat. §933.18, F.S.A. to authorize a finding of probable cause for issuance of a search warrant by an independent magistrate has been considered and found unmeritorious.

We have examined the two affidavits, and we find therein ample facts within the personal knowledge of the two affidavits to justify issuance of a search warrant. See, State v. Wolff, Fla. 1975, —— So.2d ——, (Case No. 45,447, filed February 26, 1975); Andersen v. State, Fla. 1973, 274 So.2d 228; Reed v. State, Fla. 1972, 267 So.2d 70.

Therefore, for the reasons stated and upon the authorities cited and discussed, the judgment and sentence appealed are affirmed.

Affirmed.

APPENDIX B

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1975
WEDNESDAY, JUNE 18, 1975

CASE NO. 74-863

WALTER B. LEBOWITZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk District Court of Appeal,
Third District

By: signature illegible

Chief Deputy Clerk
cc: Philip Carlton, Jr.
Linda C. Hertz

APPENDIX C

SUPREME COURT OF FLORIDA

JANUARY TERM, A.D., 1976
WEDNESDAY, JANUARY 21, 1976

CASE NO. 47,643

DISTRICT COURT OF APPEAL,
THIRD DISTRICT

74-863

WALTER B. LEBOWITZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, Acting Chief Justice, OVERTON, ENGLAND and SUNDBERG, JJ., Concur

BOYD, J., dissents

A True Copy
TEST:

/s/ Sid J. White
Clerk, Supreme Court.

APPENDIX D

IN THE SUPREME COURT
OF FLORIDA

JANUARY TERM, 1976
TUESDAY, MARCH 9, 1976

CASE NO. 47,643

WALTER B. LEBOWITZ,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

On consideration of the Petition for Rehearing filed by petitioner,

IT IS ORDERED that said petition is denied.

OVERTON, C.J., ROBERTS, ENGLAND AND SUNDBERG, JJ. CONCUR

BOYD, J., DISSENTS

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: signature illegible

Deputy Clerk

Y

CC. Hon. W. P. Carter, Clerk
Hon. Richard Brinker, Clerk
Hon. Sidney M. Weaver, Judge
Law Offices of
Philip Carlton, Jr.
Hon. Arthur Joel Berger
Hon. Robert L. Shevin
Hon. Linda Collins Hertz
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